Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-470

NATHAN PORTNER,

Petitioner,

vs.

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL; MICHAEL J. MITZNER; J. MICHAEL BREEN; GLENN OWEN; THOMAS J. BADER, also known as T.J. BADER; PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANFORD H. SALZ, MAX SLADOWSKY; and BERNARD ZIENTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

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October Term, 1978

No.

NATHAN PORTNER,

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vs.

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL; MICHAEL J. MITZNER; J. MICHAEL BREEN; GLENN OWEN; THOMAS J. BADER, also known as T.J. BADER; PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANFORD H. SALZ, MAX SLADOWSKY; and BERNARD ZIENTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Nathan Portner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 21, 1978.

OPINIONS BELOW

The judgment of the Court of Appeals appears in the Appendix hereto. No opinion was rendered by the Third Circuit Court of Appeals. The letter opinion of the Honorable Frederick B. Lacey, Judge, United States District Court for the District of New Jersey, also appears in the Appendix hereto along with the judgment entered.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 21, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the immunity status of a prosecuting attorney and his staff with regard to the investigative and administrative functions of that office require clarification?

2. Should the United States Supreme Court set guidelines for determining what activities of a prosecuting attorney fall in the categories of judicial activities, investigative or administrative activities?

3. Should the prosecuting attorney be clothed with absolute immunity for activities that fall in the range of investigative or administrative functions rather than judicial functions?

4. Was the dismissal of plaintiff's complaint under Rule 12(b), without permitting discovery, a deprivation of his property without due process of law?

STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment 5

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Code, Title 28:

Section 1254. Courts of Appeals; Certiorari; Appeal, Certified Questions.

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ."

United States Code, Title 42:

Section 1983. Civil Action for Deprivation of Rights.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

New Jersey Statute, Title 2A:

Section 84-14. Aiders and Abettors: Principals.

"Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal.

Any person who wilfully causes another to commit a crime is punishable as a principal."

Section 91-1. Bank Officials, Etc., Asking or Receiving Bribes or Undue Fees.

"Any officer, director, employee, agent or attorney of a bank, trust company, savings bank, building and loan association, savings and loan association or credit union who, directly or indirectly, asks for, demands, exacts, requires, receives or accepts, for his personal use, benefit or advantage, any money, or any other property or other thing, or any credit, or any promissory note, bill of exchange, check or other evidence of debt, or any security, promise, contract, covenant, agreement or obligation, express or implied, for the payment, delivery, alienation or transfer of any money, property or other thing, or for the performance or rendering of any act or service, as a bribe, present, reward, inducement,

commission or fee for loaning any funds of or giving any credit on behalf of such bank, trust company, savings bank, building and loan association, savings and loan association or credit union, or for recommending, approving, voting for or consenting to the making of any loan or the giving of any credit by such bank, trust company, savings bank, building and loan association, savings and loan association or credit union, is guilty of a misdemeanor."

F.R.C.P. 12(b):

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters

outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

STATEMENT OF THE CASE

Sandy Motors, Inc. is a New Jersey corporation which was formed on or about February 19, 1965 by Mathilda Portner who is the sole stockholder and director of the corporation. Plaintiff, Nathan Portner, is the husband of Mathilda Portner and has been the vice president and general manager of the corporation since its inception.

Defendant, Community State Bank and Trust Company, is a banking corporation of the State of New Jersey with its main office located on Wood Avenue in Linden, New Jersey, and will be referred to hereinafter as the "Bank".

Defendants, Thomas J. Bader, also known as T.J. Bader, Leo Kaplowitz and Lloyd Harris, were, at all times, relevant hereto, officers and directors of the defendant Bank.

Defendant, Peggy Fitz, was an employee of the Bank at the time of the occurrence in question and has since been made an officer of the Bank.

Defendants, Arthur R. Croucher, John C. Giordano, Jr., Seymour Goldberg, Theodore Ley, Joseph Resnick, Fred Rothschild, Sanford H. Salz, Max Sladowsky and Bernard Zients were, at all times referred to herein, directors of the defendant Bank.

Defendants, Karl Asch and Leo Kaplowitz were, at various times, Prosecutors for the County of Union and State of New

Jersey. Defendant, Karl Asch, was the Prosecutor at the time of the occurrences referred to herein and defendant, Leo Kaplowitz, was the Prosecutor at a time prior to the appointment of Karl Asch.

Defendant, Howard Frankel, was a Lieutenant of Detectives working for the Office of the Union County Prosecutor during the tenure of Leo Kaplowitz and Karl Asch.

Defendant, Michael J. Mitzner was a former Assistant Union County Prosecutor during the time referred to herein.

Defendants, J. Michael Breen, and Glenn Owen were investigators with the office of the Union County Prosecutor at the times referred to herein.

Sandy Motors, Inc., a corporation engaged in the business of buying and selling used motor vehicles, had a close business relationship with the defendant Bank for a substantial number of years prior to the incident in question. Defendant, Lloyd Harris, was first employed by the Bank during the year 1973 and was elected as president of the Bank in April, 1974.

Mathilda Portner had purchased a substantial number of shares of the Bank's stock during the years when the Bank and Sandy Motors, Inc. had a good business relationship. The market value of said stock dropped severely from its high of approximately $60 per share to a low of approximately $9 per share during the year 1973 and Mathilda Portner advised the Bank that she was considering a suit against the management for mismanagement of the Bank as a result of certain dealings the Bank had in the State of North Carolina which proved to be unprofitable and caused the Bank to sustain severe losses. She believed that these losses were the cause of the drop in value of the Bank's stock. The series of events relevant to the within action commenced approximately at the same time as Mathilda Portner notified the Bank that she intended to commence a suit against it for mismanagement.

On April 19, 1974, a letter (Appendix A) was sent by the then president of the Bank, defendant, Lloyd Harris, memorializing the agreement reached after conferences between plaintiff and some of the Bank's officers and directors and which provided for the termination of all business relations between Sandy Motors, Inc. and the Bank in ninety days.

On June 24, 1974, a memorandum (Appendix B) was prepared by defendant, T.J. Bader to defendant, Peggy Fitz, instructing her that the "floor plan" of Sandy Motors, Inc. had been terminated as of that date, approximately three weeks earlier than the date set by the agreement of April 19th. This memorandum was turned over by defendant, T.J. Bader, to defendant, Lloyd Harris, on June 24, 1974.

A call was placed by defendant, Leo Kaplowitz, to defendant, Howard Frankel, and a meeting arranged between defendant, Howard Frankel, and defendant, Peggy Fitz, at the law offices of defendant, Leo Kaplowitz. Some of the other defendants were also present at this meeting. Defendant, Peggy Fitz, then prepared a written statement (Appendix D) alleging that plaintiff, Nathan Portner, had on May 8, 1974, offered to pay her $500 for a copy of the memorandum from defendant, Thomas J. Bader, referred to above. (It must be noted that this memorandum was not even drawn until June 24, 1974.) The allegation of defendant, Fitz, was vehemently denied by plaintiff.

Defendant, Howard Frankel, then arranged to intercept and transcribe telephone calls to be placed by defendant, Peggy Fitz, to plaintiff.

As the result of a series of telephone conversations between defendant, Peggy Fitz, and plaintiff, all of which were intercepted and recorded by defendants, plaintiff sought the advice of his attorney and a vice president of the Bank. After being informed by both, his attorney and the Bank's Vice President, that it was perfectly proper for him to obtain a copy of the said memorandum, plaintiff told defendant, Peggy Fitz, by telephone, that he would like to have a copy.

On June 26, 1974, plaintiff's son, Steven, went to the Bank where he was informed that Peggy Fitz had an envelope for him to deliver to his father, plaintiff. He was given a sealed envelope containing the memorandum (Appendix B) in question. Steven Portner had been placed under surveillance by defendants and, after returning to Sandy Motors, he turned over the envelope containing the memorandum to his father. Immediately thereafter, both plaintiff and his son, Steven, were placed under arrest, searched, manacled and transported to the Office of the Union County Prosecutor.

Defendant, Frankel and defendant, Mitzner, at this point and before any charge was made or filed against either Steven Portner or plaintiff, offered to file no complaint against Steven Portner if his father, plaintiff, would agree to plead "guilty" to some minor charge. Nathan Portner denied any wrongdoing and refused. Steven Portner was nevertheless released without being charged. A complaint (Appendix C) was then signed by defendant, Breen, charging plaintiff, Nathan Portner, with the violation of two New Jersey statutes and charging that plaintiff offered and promised to pay to Peggy Fitz, an employee of the Bank, the sum of $500 for a copy of a Bank record in violation of N.J.S. 2A:91-1 and N.J.S. 2A:85-14. It must be noted that there was, at the time, and there is presently no New Jersey statute prohibiting the purchase of a bank memorandum by any person, much less the person referred to in the memorandum. It must also be noted that the statute cited in the complaint refers to wrongdoing by a bank employee and, therefore, could not possibly refer to plaintiff who was never a bank employee, and, further, that said memorandum violated the Bank's agreement with Sandy Motors Inc. (Appendix A).

Approximately one and one quarter years later, after plaintiff moved for a dismissal of the complaint because the Office of the Union County Prosecutor failed to take any action on the complaint, the complaint was presented to the Union County Grand Jury which dismissed same upon the

recommendation of the Union County Prosecutor. The Honorable V. William DiBuono, Assignment Judge of the Superior Court of New Jersey for the County of Union then heard plaintiff's motion and granted an order of dismissal (Appendix E).

The within action was subsequently commenced by plaintiff in the United States District Court for the District of New Jersey by filing a complaint (Appendix F). The said complaint was duly served upon defendants. Prior to the filing of an answer by the Bank and its employees, a motion was made by the said defendants to dismiss the complaint under Rule 12(b) (Appendix G) for failure to state a cause of action. The Honorable Frederick B. Lacey, issued a letter opinion (Appendix H), and dismissed the action against defendants based upon the fact that the actions of the Office of the Prosecutor of Union County were immune from suit under 42 U.S.C. §1983, and, therefore, the action of the Bank and its employees could not be maintained under 42 U.S.C. §1983. An appeal was taken to the Third Circuit Court of Appeals and after hearing extensive argument, the Court affirmed the decisions of Judge Lacey without opinion.

REASONS FOR GRANTING THE WRIT

I.

The immunity status of a prosecuting attorney and his staff with regard to the investigative and administrative functions of that office requires clarification.

In the case of *Imbler v. Pachtman,* 424 U.S. 409 (1976), this Court held that a prosecuting attorney was absolutely immune from civil rights liability under 42 U.S.C. §1983 while performing the advocacy functions of his office. This Court, at that time, specifically declined to consider the question of whether the cloak of absolute immunity worn by the prosecuting attorney while engaged in his judicial functions also protects him from

civil liability as a result of improper acts while engaged in his administrative and investigative functions. The federal courts differ from circuit to circuit in their definition of the acts that constitute the advocacy function, the administrative function and the investigative function of the prosecuting attorney as well as the answer to the question of whether or not the Prosecutor is entitled to enjoy immunity from civil suits while acting as an investigator and/or administrator.

In the case of *Cambist Films Inc. v. Duggan,* 475 F.2d 887 (3d Cir. 1973), the court held that the illegal seizure of evidence was within the prosecutorial function of the office and, therefore, the Prosecutor and his staff enjoyed absolute immunity. The case of *Lofland v. Meyers,* 442 F. Supp. 955 (S.D.N.Y. 1977) held to the contrary that an illegal search and seizure was within the investigative function of the Prosecutor's office not the prosecutorial function.

The case of *Hilliard v. Williams,* 540 F.2d 220 (6th Cir. 1976) held the Prosecutor to be absolutely immune after he had withheld an F.B.I. report which was favorable to the plaintiff and had instructed a witness to testify evasively.

The court, in the case of *Robichaud v. Ronan,* 351 F.2d 533 (9th Cir. 1965), held that a county attorney who directed the police to obtain a confession from defendant by coercion was not clothed with immunity from civil suit.

The case of *Littleton v. Berbling,* 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds,* 414 U.S. 514 (1972), held that a case involving conspiracy to deprive black citizens of Cairo, Illinois of access to the legal system by refusing to process complaints by black persons against white persons or to permit black complaining witnesses to testify in Grand Jury proceedings against whites, involved investigative functions of the Prosecutor rather than judicial functions of the office since many of these activities occurred before trial; however, the court in the case of

Bruce v. Wade, 537 F.2d 850 (5th Cir. 1976) held that seeking indictments and presenting witnesses are clearly prosecutorial functions.

The court, in the case of *Daniels v. Kieser,* 446 F. Supp. 1160 (N.D. Ill. 1978), held that the actions of a U.S. Attorney in requesting and obtaining a bench warrant for a witness who failed to appear for testimony before a Grand Jury was a ministerial act within the administrative function of the office and the U.S. Attorney was not clothed with immunity.

The case of *Atkins v. Lanning,* 556 F.2d 485 (10th Cir. 1977), held that while it is true that some investigative work is necessarily a prerequisite to the preparation of a prosecuting attorney's case, this does not automatically change the nature of his function to resemble that of a police officer.

In the case of *Clark v. Lutcher,* 436 F. Supp. 1266, *motion for dismissal denied,* 415 (M.D. Pa. 1977), when the court held that the arrest and incarceration of plaintiff without probable cause was a non-prosecutorial activity. The court in the case of *Austin v. Manlin,* 433 F. Supp. 648 (E.D. Pa. 1977), held that the acts of intercepting and photostating a prisoner's letters, for the purpose of finding evidence, was investigatory and in the case of *Slavin v. Curry,* 574 F.2d 1254 (5th Cir. 1978), it was held that the prosecutorial function does not extend to the alteration of trial transcripts. Similarly, in the case of *Walker v. Cahalan,* 542 F.2d 681 (6th Cir. 1976), it was held that the prosecuting attorney was not immune from civil liability if he sent a damaging letter about plaintiff to the Michigan House of Representatives which letter was sent after an order of *nolle prosequi* had been entered on a murder charge against plaintiff and while no charges were currently pending before the court.

The Third Circuit Court of Appeals found that a Prosecutor may be liable for his acts regardless of whether he was acting in a prosecutorial or investigative role, if those actions were outside of a proper performance of his duties, *Helstoski v. Goldstein,* 552 F.2d 564 (3rd Cir. 1977).

The most recent decision was in the case of *Briggs v. Goodwin,* 569 F.2d 10 (D.C. Cir. 1977), *cert. denied* (1978), in which a special U.S. Attorney lied on the witness stand during a Grand Jury investigation, the court held that he was not immune from prosecution since his activities were investigative rather than prosecutorial.

II.

A decision of this Court is required to set the guidelines for determining whether the activities of a prosecuting attorney and his staff fall in the category of his prosecutorial function, investigative function or administrative function.

The courts of several circuits have attempted, without success, to define the guidelines in order to determine whether certain activities of a prosecuting attorney and his staff fall within the advocacy function of the office or whether they fall within the investigative or administrative functions of the office. In the case of *Briggs v. Goodwin, supra,* the court stated at page 23:

> "The timing of the prosecutorial action, by itself is not dispositive of the immunity issue. The fact that a Grand Jury is about to hear testimony does not imply that all subsequent prosecutorial activity is *ipso facto* advocacy, and not investigation . . . Attention must be focused on the behavior itself, not solely on its timing."

In the case of *Atkins v. Lanning, supra,* the Tenth Circuit Court of Appeals held that the persons working under the Prosecutor share the same immunity as the Prosecutor. The court stated at page 489:

> "As to the District Attorney's investigators, it would hardly seem reasonable to exculpate the District Attorney and not immunize his underlings."

The Third Circuit was in accord in the case of *Waits v. McGowan,* 516 F.2d 203 (3rd Cir. 1975). The Seventh Circuit, however, held to the contrary. In the case of *Littleton v. Berbling, supra,* the court stated at page 414:

> "The investigator would not be entitled to immunity in any event from injunction and, in all probability, not from civil rights action for damages . . . We note from the Complaint that the investigator might seem border more in the nature of a policeman-detective."

In like manner, the Fifth Circuit held in the case of *Slavin v. Curry, supra,* at page 1267, that where the plaintiff alleged that the police and District Attorney's investigators beat him and verbally abused him, that the investigators were only entitled to the same qualified immunity as that given to the Chief of Police and police officers.

In the present case, plaintiff's complaint was dismissed by Judge Lacey on defendant's motion pursuant to Rule 12b prior to the filing of an answer by some defendants. Judge Lacey, in his opinion (Appendix H), held that the activities of the Prosecutor's detectives in recording telephone conversations, arresting and searching plaintiff and his son, detaining plaintiff and his son, attempting to coerce plaintiff into entering a "guilty" plea to a charge not yet filed in order to obtain the release of his son, and the filing of a complaint against plaintiff signed by a Prosecutor's investigator, which complaint was invalid on its face, all constituted prosecutorial duties and, therefore, clothe the Prosecutor and his detectives with absolute immunity despite the fact that the complaint only charged the Prosecutor with failing to supervise his employees in order to avoid those employees using their official powers to assist a former Prosecutor in a non-prosecutorial matter.

III.

The prosecuting attorney and his staff should not be granted absolute immunity for actions taken by them while performing the administrative and investigative functions of their office.

This Court reviewed the history of the immunity doctrine and the reasons for the doctrine in the *Imbler* case, *supra.* In summation, this Court determined that the ultimate fairness of the operation of the system itself could be weakened by subjecting Prosecutors to Section 1983 liability while performing their advocacy functions. The question that must be decided at the case at bar is whether the ultimate fairness of the operation of the system itself would be weakened by subjecting Prosecutors and their staffs to civil liability under Section 1983 while they are performing duties other than those required in their function as an advocate. We believe it would not be weakened.

In the case of *Bradley v. Fisher,* 80 U.S. 335 (1872), this Court declared that:

> "It is a general principal of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own conviction, without apprehension of personal consequences to himself."

In the case of *Briggs v. Goodwin, supra,* the court in denying absolute immunity to the special U.S. Attorney stated at page 15:

> "The difficulty with this approach is that any allegation that an official, acting under color of law, has deprived someone of his rights necessarily implies that in the particular case, the

> official exceeded his authority. Such logic would completely abrogate the doctrine of immunity rather, in heeding a district judge's directive to answer a question relating to his official duties, appellant performed the kind of act not 'manifestly or palpably beyond his authority,' but rather 'having more or less connection with the general matters committed by law to his control or supervision.' (Cases cited.) The question, then, is whether the immunity to be accorded appellant is qualified or absolute."

The court then found that the appellant's alleged behavior in the *Briggs* case, *supra,* fell outside the confines of the prosecutorial activities for which *Imbler, supra,* prescribed an absolute prosecutorial immunity. The court further held:

> "We hold that appellant here is entitled only to a qualified immunity, that is to say, his protection from liability depends upon a showing that he entertained a good faith, reasonable belief in the truth of his response to the Federal District Judge in Florida. In reaching this result, we rely on the series of federal decisions distinguishing between a prosecutor's role as advocate, on the one hand, and his function as administrative or investigative officer, on the other."

We further rely on the Supreme Court's recognition of this distinction in *Imbler, supra,* and its expressed disclaimer of any intention to extend the sway of that case beyond those prosecutorial activities "intimately associated with the judicial phase of the criminal process."

In the case of *McCray v. Mayland,* 456 F.2d 1 (4th Cir. 1972), the court dealt with the question of immunity for "quasi judicial officers" such as prosecuting attorneys and stated:

> "The immunity of 'quasi judicial' officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to secure the courageous exercise of their discretionary duties. Where an officer is not called upon to exercise judicial or quasi judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role to the judicial system."

In the case at bar, plaintiff complains about actions taken by the Prosecutor and his staff. These actions were all taken prior to the issuance of any complaint against him and the complaint that was eventually issued was invalid on its face and charged plaintiff with certain actions which violated no New Jersey statute. Under these circumstances, can it possibly be said that the activities of the Prosecutor and his detectives were taken within the confines of the judicial function of that office?

IV.

The actions of Judge Frederick B. Lacey in dismissing plaintiff's complaint without permitting plaintiff the opportunity of engaging in discovery proceedings and presenting the court with evidence, constitutes a deprivation of plaintiff's property rights without due process of law in violation of the Fifth Amendment of the United States Constitution.

Judge Frederick B. Lacey dismissed plaintiff's complaint brought under 42 U.S.C. §1983 based upon the complaint and defendant's motion under Rule 12b. Judge Lacey's decision was not predicated on any evidence but merely the wording of the

complaint. In the case of *Helstoski v. Goldstein, supra,* the Third Circuit Court of Appeals reversed a similar dismissal of plaintiff's complaint stating:

> "The District Court dismissed Mr. Helstoski's Complaint before any discovery was had and before any evidence was received. Under such circumstances, we must take all of the well pleaded allegations of the Complaint as true, construe the Complaint in the light most favorable to the plaintiff, and determine whether, under any circumstances, the plaintiff might be entitled to any relief."

This Court made the same finding in the case of *Conely v. Gibson,* 355 U.S. 41 (1957) where the Court stated:

> "In apprising the sufficiency of the Complaint, we follow, of course, the accepted rule that a Complaint should not be dismissed for failure to state a claim unless it appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In the case at bar, Judge Lacey failed to provide plaintiff with an opportunity to show, by evidence, that the Prosecutor's detectives were acting outside the scope of their duties with the Office of the Prosecutor. There could be no determination as to whether the actions of the detectives were within the duties of the Office of the Prosecutor or were investigative in nature or were prosecutorial in nature until some evidence was advanced to show what were the duties of the Prosecutor and his staff. Judge Lacey in his letter opinion (Appendix H) stated on pages 20a and 21a.

> "The common law immunity of a Prosecutor is not absolute. It is an immunity derived from the immunity of judges and does not extend to acts

> clearly outside of the authority of jurisdiction of Prosecutor."

Despite the fact that there was no evidence presented, Judge Lacey found, in his opinion, on page 22a, the acts of the prosecutorial defendants were not clearly outside of the authority of jurisdiction of the office.

CONCLUSION

The issues presented here are of such general importance and for all the reasons heretofore stated, that a writ of certiorari should issue to review the judgment of the Third Circuit Court of Appeals.

Respectfully submitted,

s/ Richard Silver
Attorney for Petitioner

APPENDIX A — LETTER FROM LLOYD HARRIS TO NATHAN PORTNER DATED APRIL 19, 1974

COMMUNITY STATE BANK AND TRUST COMPANY

601 NORTHWOOD AVENUE LINDEN, N.J. 07036

LLOYD HARRIS
President

April 19, 1974

Mr. Nathan Portner
Sandy Motors, Inc.
300 St. Georges Ave. E.
Linden, N.J. 07036

Dear Sandy:

Thank you for meeting with me and members of my staff on April 17, 1974. I would like to take this opportunity to reiterate the pertinent aspects of that discussion and restate this Bank's position.

As you know, financial organizations constantly reevaluate loan portfolios. Recently, such an evaluation was conducted by the Senior Management of this organization; and, as I stated to you, your firm's relationship to this Bank was analyzed. While the Bank appreciated your business in the past, it is Senior Management's decision that, at this time, the Bank's sights are in other directions.

I am confirming that the Bank is extending the ongoing relationship for a period of 90 days from the date of our meeting, which you stated was more than enough time to arrange for another financial institution to service your needs.

Appendix A

At the conclusion of the 90 day transition period, the Bank will discontinue your firm's retail financing arrangement and you shall have liquidated your wholesale floor plan and commercial borrowings. During this interim period, I agreed to the Bank's considering the purchase of credit worthy retail instalment contracts to a maximum of $28,000.00 monthly; i.e., the equivalent of the monthly amortization of your existing retail portfolio.

I was pleased to accept your firm pledge of continued cooperation and efforts to affect an orderly runoff of the outstanding retail paper. Let's not hesitate to communicate with each other where there appears concern or apparent lack of understanding during this immediate period, and subsequently.

Very truly yours,

s/ Lloyd Harris
Lloyd Harris
President

LH:do

APPENDIX B — MEMORANDUM FROM T.J. BADER TO PEGGY FITZ DATED JUNE 24, 1974

June 24, 1974

To: Peggy Fitz, Note Teller

From: T.J. Bader, Vice President

Subj: Sandy Motors, Inc.

The captioned dealers floor plan is to be discontinued, effective today.

s/ T.J. Bader
T.J. Bader
Vice President

APPENDIX C — COMPLAINT EXECUTED BY INVESTIGATOR BREEN DATED JUNE 26, 1974

THE STATE OF NEW JERSEY

vs.

Defendant: Nathan Portner
Address: 2 Zaydee Drive
City, State: Edison, New Jersey

UNION COUNTY COURT
UNION, N.J.

Complainant: Inv. J. Michael Breen of Union County Prosecutor's Office

Residing at Courthouse, Elizabeth, N.J.

Upon oath says that, to the best of (his) knowledge, information and belief, the named defendant on or about —
Between 9 May and 26th day of June, 1974 in the City of Linden, County of Union did;

Between May 9, 1974 and June 26, 1974 in the City of Linden, County of Union, did offer and promise to pay to Peggy Fitz, an employee of the Community State Bank & Trust Co., the sum of $500. for a copy of a bank record in violation of NJS 2A:91-1 and NJS 2A:85-14.

Charge Number 1	Charge Number 2
N.J.S. 2A:91-1	N.J.S. 2A:85-14

Subscribed and sworn to before me this 26th day of June, 1974

Signed John P. Walsh, J.C.C. Signed Inv. J. Michael Breen

Appendix C

To any peace officer or other authorized person: Pursuant to this warrant, you are hereby commanded to arrest the named defendant and bring (him) forthwith before this court to answer the foregoing complaint.

Bail has been fixed by Court in the amount of $500.00 cash

s/ John P. Walsh

APPENDIX D — STATEMENT BY PEGGY FITZ

On May 8th in the morning I was informed by Mr. Toland that we were not to floor any more cars in Sandy Motors, at that time I told Mr. Toland I wanted this in writing. In the afternoon Mr. Winters approached me and asked if I was told not to floor for Sandy Motors and I told him yes, and that I had asked for it in writing from Mr. Toland. Mr. Winter told me to forget Mr. Toland's instructions and continue to floor for Sandy, and if Mr. Toland asked me why I was to tell him I got my instruction from a Vice President and he was only an asst. Treasurer.

On Thursday May 9th about 3 o'clock in the afternoon Sandy Portner called me and told me everything that had taken place the day before word for word and at that time offered me $500.00 for a copy of the memo if I ever got it from Mr. Toland. With this the conversation ended.

I do not know if this was in jest or if he was serious. Which ever it was I did not appreciate receiving an offer of this kind from him or anyone else.

Although I did not mention this in our conversation I feel that I must tell you that on Wednesday evening, May 8th I was returning from a farewell dinner for Claudia Korbet with three of the other girls from the bank, and when we passed Sandy Motors Mr. Winters was seen standing the Sandy's showroom talking to Mr. Portner.

s/ Peggy Fitz

APPENDIX E — ORDER OF JUDGE V. WILLIAM DI BUONO DISMISSING COMPLAINT AGAINST PORTNER DATED OCTOBER 29, 1975

UNION CO. CLERK'S OFFICE
RECEIVED
OCT 29 1975
WALTER G. HALPIN, Clerk

RICHARD SILVER
1139 EAST JERSEY STREET
ELIZABETH, N.J. 07201
(201) 353-0443
ATTORNEY FOR DEFENDANT

UNION COUNTY COURT
CRIMINAL DIVISION

Plaintiff
STATE OF NEW JERSEY

vs.

Defendant
NATHAN PORTNER

Docket No. 73 M 600
CIVIL ACTION

This matter having been brought on for hearing on Friday, October 17, 1975, as Motion No. 10, before the Honorable V. William DiBuono, A.J.S.C., by Richard Silver, attorney for defendant Nathan Portner, in the presence of the Honorable Edward W. McGrath, Union County Prosecutor (Robert A. Kopnicki, Assistant Prosecutor, appearing), and the Court having considered the pleadings, affidavits, and argument of counsel, and good cause having been shown.

Appendix E

It is on this 29th day of October, 1975 ORDERED that Complaint by the State of New Jersey vs. Nathan Portner, No. W674017, be and the same is hereby dismissed.

s/ V. William Di Buono
V. WILLIAM DI BUONO
A.J.S.C.

APPENDIX F — COMPLAINT BY PORTNER IN UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION FILE NO. _____

NATHAN PORTNER,

Plaintiff

-vs-

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL; MICHAEL J. MITZNER; J. MICHAEL BREEN; GLENN OWEN; THOMAS J. BADER, also known as T. J. BADER; PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANFORD H. SALZ; MAX SLADOWSKY; and BERNARD ZIENTS,

Defendants

I

PLAINTIFF

1. Plaintiff, NATHAN PORTNER, is now, and at all times material to this Action was, a citizen of the United States of America and a resident of the Township of Edison, County of Middlesex and State of New Jersey.

Appendix F

II

JURISDICTION

2. This Court has jurisdiction of this Cause under and by virtue of Title 28 of the United States Code, Section 1343.

3. This Action arises under the United States Constitution, particularly under the Fourth, Fifth, Tenth and Fourteenth Amendments to the Constitution of the United States, and under Federal Law, particularly Title 42 of the United States Code, Section 1983.

III

DEFENDANTS

4. Defendant, Community State Bank and Trust Company, is, and at all times material to this Action was, a banking corporation formed and registered under the laws of the United States of America and the State of New Jersey, and has its principal office located in this Judicial District.

5. Defendant, Karl Asch, is, and at all times material to this Action was a resident and citizen of the United States of America and the State of New Jersey, and of this Judicial District, and was lawfully acting as Union County Prosecutor and was in charge of and responsible for the actions of all employees assigned to the Office of the Union County Prosecutor.

6. Defendants, Howard Frankel, Michael J. Mitzner, J. Michael Breen and Glenn Owen, are, and at all times material to this Action were, residents and citizens of the United States of America and the State of New Jersey, and of this Judicial District, and employees of the Office of the Prosecutor of the County of Union.

Appendix F

7. Defendants, Leo Kaplowitz, Lloyd Harris, Arthur R. Croucher, John C. Giordano, Jr., Seymour Goldberg, Theodore Ley, Joseph Resnick, Fred Rothschild, Sanford H. Salz, Max Sladowsky and Bernard Zients, are, and at all times material to this Action were, residents and citizens of the United States of America and the State of New Jersey, and of this Judicial District and were Directors of defendant, Community State Bank and Trust Company.

8. Defendants, Thomas J. Bader, also known as T. J. Bader, Leo Kaplowitz, Lloyd Harris, Arthur R. Croucher and Theodore Ley, are, and at all times material to this Action were, residents and citizens of the United States of America and the State of New Jersey and of this Judicial District, and officers of defendant, Community State Bank and Trust Company. Defendants, Leo Kaplowitz and John C. Giordano, Jr., were General Counsel and Special Counsel, respectively, to defendant, Community State Bank and Trust Company.

9. Defendant, Peggy Fitz, is, and at all times material to this Action was, a resident and citizen of the United States of America and the State of New Jersey, and of this Judicial District, and an employee of defendant, Community State Bank and Trust Company.

IV

CAUSE OF ACTION

10. Sometime prior to June 26, 1974, defendants, Leo Kaplowitz, Thomas J. Bader, also known as T. J. Bader, Peggy Fitz, Howard Frankel and Community State Bank and Trust Company did conspire to entrap plaintiff and did arrange to have defendant, Peggy Fitz, telephone plaintiff and infer that plaintiff offered her money to illegally secure confidential documents belonging to defendant, Community State Bank and

Appendix F

Trust Company, and turn same over to plaintiff; and said defendants did unlawfully record said telephone conversation between defendant, Peggy Fitz, and plaintiff.

11. On June 26, 1974, plaintiff was illegally arrested, assaulted and battered by defendants, Howard Frankel, J. Michael Breen, Glenn Owens and other employees of the office of the Union County Prosecutor, and transported, in manacles, to the Office of the Union County Prosecutor where he was detained for several hours.

12. Prior to the filing of any Complaint against plaintiff, defendants, Michael J. Mitzner and Howard Frankel, had advised plaintiff, Nathan Portner, that if he entered a plea of "Guilty" to a minor offense, he would be charged under the Disorderly Persons Act of the State of New Jersey. If, however, he refused to agree to enter a plea of "Guilty" to a "Disorderly Persons" violation, he and his son, Steven Portner, would be charged with the commission of a "High Misdemeanor".

13. When plaintiff, Nathan Portner, contended that he was innocent of any criminal act and, therefore, refused to enter a "guilty plea" to any charge, defendant, Investigator J. Michael Breen, an employee of the Office of the Prosecutor of Union County, New Jersey, did sign a Complaint charging plaintiff with violation of N.J.S. 2A:91-1 and N.J.S. 2A:85-14 "in that between May 9, 1974 and June 26, 1974 in the City of Linden, County of Union, and State of New Jersey, he did offer and promise to pay to Peggy Fitz, an employee of the Community State Bank and Trust Company, the sum of $500.00 for a copy of a bank record". Plaintiff was, thereafter, released on $500.00 cash bail.

14. On or about October 3, 1975, the Complaint against plaintiff was presented to the Union County Grand Jury by the Office of the Prosecutor of Union County which Grand Jury refused to return a "true bill" against plaintiff.

Appendix F

15. On October 17, 1975, the Complaint against plaintiff was dismissed by Order of the Honorable V. William DiBuono, Judge of the Superior Court of New Jersey, on plaintiff's Motion for Dismissal.

16. The arrest of plaintiff and his unlawful detention violated his right to equal protection and due process of law.

17. By reason of the illegal arrest of plaintiff and his unlawful detention and imprisonment, plaintiff was required to and did employ legal counsel to secure plaintiff's release and subsequent dismissal of the Complaint filed against plaintiff.

18. Plaintiff incurred reasonable attorney's fees in the sum of $3,500.00 in connection with the aforementioned proceedings, together with out-of-pocket disbursements.

19. By reason of the conduct of defendants, and each of them, including that of unlawful arrest and imprisonment of plaintiff, and the injuries sustained by plaintiff therefrom, plaintiff was unable to attend to the duties of his business as General Manager of Sandy Motors, Inc., was required to obtain medical treatment, suffered great fear and anxiety, mental and emotional distress, embarrassment and was unable to attend to his duties as a husband and father and, thereby, damaged in the amount of $50,000.00.

20. The conduct of defendants, and each of them, deprived plaintiff of the following rights, privileges and immunities secured to him by the Constitution of the United States:

(a) The right of plaintiff to be secure in his person and effects against unreasonable search and seizure under the Fourth and Fourteenth Amendment of the Constitution of the United States.

Appendix F

(b) The right of plaintiff not to be deprived of life, liberty or property without due process of law, and the right to equal protection of the laws, secured by the Fifth and Fourteenth Amendments of the Constitution of the United States.

(c) The right to have a speedy and public trial, by an impartial jury, and to be informed of the nature and cause of the accusations against him, secured by the Sixth Amendment of the Constitution of the United States.

21. The actions conduct and behavior of defendants, and each of them, were performed knowingly, intentionally and maliciously, by reason of which plaintiff is entitled to an award of punitive damages in the sum of $5,000,000.00.

WHEREFORE, plaintiff demands judgment against defendants, individually, jointly and severally, as follows:

1. Awarding the plaintiff damages in the sum of $50,000.00;

2. Awarding plaintiff punitive damages in the sum of $5,000,000.00;

3. Awarding plaintiff the reasonable costs and expenses of this Action, including the cost of depositions and investigations; and

4. Granting plaintiff such other and further relief as may be just.

Appendix F

DATED: June 18th, 1976

s/ Richard Silver
RICHARD SILVER
ATTORNEY FOR PLAINTIFF

Plaintiff hereby demands trial by jury on all issues in the within Complaint.

DATED: June 18th, 1976

s/ Richard Silver
RICHARD SILVER
ATTORNEY FOR PLAINIFF

APPENDIX G — NOTICE TO DISMISS PURSUANT TO RULE 12(b)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 76-1208 FBL

[Same Title]

TO: RICHARD SILVER, ESQ.
1139 East Jersey Street
Elizabeth, New Jersey 07201

SIR:

Defendants Community State Bank & Trust Company, a New Jersey corporation, Thomas J. Bader, Peggy Fitz, Leo Kaplowitz, Lloyd Harris, Arthur R. Croucher, John C. Giordano, Jr., Seymour Goldberg, Theodore Ley, Joseph Resnick, Fred Rothschild, Sanford H. Salz, Max Sladowsky and Bernard Zients move the Court for an order dismissing the Complaint herein pursuant to the provisions of Rule 12(b) of the Fed. Rules of Civ. Proc. for failure to the Complaint to set forth a cause of action.

In support of the motion, defendants shall rely upon the Memorandum of Law annexed hereto.

SILLS, BECK, CUMMIS,
RADIN & TISCHMAN, P.A.
Attorneys for Defendants

By: s/ Morton S. Bunis
MORTON S. BUNIS

Appendix G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[Same Title]

Civil Action No. 76-1208 FBI

NOTICE OF MOTION

TO: RICHARD SILVER, ESQ.
1139 East Jersey Street
Elizabeth, New Jersey 07201

SIR:

Please Take Notice that on September 13, 1976 at 10 a.m. or as soon thereafter as counsel can be heard, the defendants will bring the above motion on for hearing before the Honorable Herbert J. Stern at the United States Courthouse, Newark, New Jersey.

SILLS, BECK, CUMMIS,
RADIN & TISCHMAN, P.A.
Attorneys for Defendants

By: s/ Morton S. Bunis
MORTON S. BUNIS

Dated: August 19, 1976

CERTIFICATION

I hereby certify that on the 19th day of August, 1976 I caused a copy of the foregoing Motion To Dismiss Pursuant to

Appendix G

Rule 12(b) and Notice of Motion and Brief to be served upon the attorney for the plaintiff, Richard Silver, by depositing a true copy of same enclosed in a post paid properly addressed envelope, in — a post office — official depository under the exclusive care and custody of the U.S. Postal Service.

s/ Morton S. Bunis
MORTON S. BUNIS

APPENDIX H — LETTER OPINION OF HONORABLE FREDERICK B. LACEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
FREDERICK B. LACEY
JUDGE

UNITED STATES
COURT HOUSE
NEWARK, N.J. 07101

ORIGINAL TO THE CLERK

October 12, 1976

Richard Silver, Esq.
1139 East Jersey Street
Elizabeth, New Jersey 07201

Morton S. Bunis, Esq.
Sills, Beck, Cummis, Radin & Tischman, P.A.
33 Washington Street
Newark, New Jersey 07102

Re: Portner v. Community State Bank & Trust Co.
Civil #76-1208

Counsel:

I have received and reviewed all submissions on defendants' motion to dismiss and perceive no necessity for oral argument. Accordingly, pursuant to Fed. R. Civ. P. 78, I am determining this motion on the papers before me.

Plaintiff is suing Community State Bank and Trust Company (Bank), Karl Asch, former Union County Prosecutor, and several individual defendants who were either former employees of the prosecutor's office or of the aforementioned bank for various acts allegedly committed by them which

violated plaintiff's fourth, fifth, sixth and fourteenth amendment rights under the Constitution. The action is brought under 42 U.S.C. §1983. Plaintiff alleges that defendant Bank and several bank employees conspired with defendant Frankel, an employee of the prosecutor's office, to entrap plaintiff and to unlawfully record a conversation between him and defendant Fitz, a bank employee, for the purpose of showing that plaintiff attempted to pay an illegal bribe to defendant Fitz. Plaintiff charges defendants Frankel, Breen and Owens, employees of the prosecutor's office, with illegal arrest, assault and battery and unlawful detention. Defendants Mitzner and Frankel, he alleges, advised him that if he entered a guilty plea to a minor offense, he would be charged with a Disorderly Persons violation; if he refused, he and his son would be charged with the commission of a "High Misdemeanor." He alleges that when he refused to enter a guilty plea he was charged with violations of N.J. Stat. Ann. 2A:91-1, 2A:85-14 in retaliation, which complaint was dismissed on October 17, 1975.

The requirement that the alleged conspiracy be under color of state law, is of course, satisfied in that some of the defendants are members of the Union County Prosecutor's office.

The defendants base their motion on two grounds. They argue that the members of the prosecutor's office are immune from suit under section 1983. Because they are immune, the private defendants cannot then be held liable since they allegedly are not conspiring with persons acting under color of state law against whom a valid claim could be stated. Defendants urge, secondly, that plaintiff fails to allege facts in his complaint with sufficient specificity as to constitute a proper pleading of a §1983 cause of action.

The common-law immunity of a prosecutor is not absolute. It is an immunity derivation from the immunity of judges and does not extend to acts clearly outside the authority or

jurisdiction of the office of prosecutor. *United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3d Cir. 1972); *United States ex rel. Rauch v. Deutsch*, 456 F.2d 1301 (3d Cir. 1972); *Bethea v. Reid*, 445 F.2d 1163 (3d Cir. 1974), *cert. denied*, 404 U.S. 1061 (1972); *Gaito v. Ellenbogen*, 425 F.2d 845 (3d Cir. 1970); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1021 (1967).

In *Kaufman v. Moss*, 420 F.2d 1270 (3d Cir. 1970), plaintiff was convicted by a jury of conspiracy to commit burglary, burglary and larceny in state court. He then brought a suit for damages under the Civil Rights Act against the county district attorney and three other plaintiffs alleging that they had conspired to secure his convictions by the knowing use of perjured testimony. The court found that the district attorney was acting within his jurisdiction in bringing a criminal charge against plaintiff for a claimed violation of state law regardless of the allegations that the subsequent conviction was the result of perjured testimony. The district court's dismissal of the complaint for failure to state a claim, as to the prosecutor, was affirmed because of his immunity from suit. *Id.* at 1273. *See also Bethea v. Reid, supra,* at 1165.

In *Tunnell v. Wiley*, 369 F. Supp. 1260 (E.D. Pa. 1974), where the plaintiff charged that the state prosecutor as well as a newspaper reporter had violated his civil rights by the publishing of a newspaper article allegedly prepared by both, the court found that even if it were shown that the prosecutor aided in the preparation of the article and the article deprived plaintiff of his right to a fair trial, the prosecutor was immune "since the acts alleged were not 'clearly outside the authority or jurisdiction of the office.'" *Id.* at 1270 (quoting *Bauers v. Heisel, supra,* at 590-91).

The first allegedly illegal act asserted by plaintiff is the conspiracy to entrap plaintiff by wiretapping the telephone

conversation between him and defendant Fitz. I find that, based on the above-mentioned criteria, the alleged acts of the defendant Frankel, as an employee of the prosecutor's office, were not clearly outside the authority of jurisdiction of the office. He was investigating a possible violation of the laws of New Jersey. See *Cambist Films, Inc. v. Duggan,* 475 F.2d 887, 889 (3d Cir. 1973).

I find, in similar manner, that the activities of defendants Frankel, Mitzner, Breen and Owens in arresting, transporting, charging and issuing a complaint against plaintiff were each "an integral part of the judicial process." *See Imbler v. Pachtman,* 424 U.S. 409, 430 (1976); *Bauers, supra; Tunnell, supra.*

Accordingly, the motion for dismissal of the complaint as to defendant Mitzner is granted and as to defendants Frankel, Breen and Owens on the above-mentioned counts. The only count remaining, which I find defendants Frankel, Breen and Owens potentially liable, is that of alleged assault and battery which are acts without the scope of their jurisdiction. The motion for dismissal is denied with respect to this count. This denial is, of course, without prejudice to a renewal of the application as facts develop defining defendants exact roles in the controversy.

I further find that no cause of action is stated against defendant Asch. No specific act by him is alleged in the complaint. He is being sued in his official capacity as Union County Prosecutor. I have earlier found, however, that the acts of his employees were within the scope of their offices and they were therefore immune. The remaining count against any of his employees, the allegation of assault and battery, is outside the scope of their authority and therefore defendant Asch cannot be held liable. The complaint is dismissed as to him.

The remaining defendants, former employees of Community State Bank and Trust Company and the Company itself, are private persons. Even if the alleged claims against them were true, they cannot be held liable in that they were not conspiring with persons acting under color of state law against whom a valid claim could be stated. *Hill v. McClellan,* 490 F.2d 859, 860 (5th Cir. 1974); *Haldane v. Chagnon,* 345 F.2d 601, 604 (9th Cir. 1965); *Meyer v. Lavelle,* 389 F. Supp. 972, 976 (E.D. Pa. 1975). Indeed, plaintiff fails to allege any acts at all performed by defendants Harris, Croucher, Giordano, Goldberg, Lay, Resnick, Rothschild, Salz, Sladowsky and Zients.

I find, therefore, that plaintiff fails to state a claim against the private defendants as well. Defendants' motion to dismiss the claim as against these defendants is granted.

Submit an appropriate form of order.

Very truly yours,

s/ Frederick B. Lacey
Frederick B. Lacey
United States District Judge

FBL:abw

APPENDIX I — ORDER OF DISMISSAL BY JUDGE LACEY DATED OCTOBER 26, 1976

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

NATHAN PORTNER,

Plaintiff,

-vs-

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL; MICHAEL J. MITZNER; J. MICHAEL BREEN; GLENN OWEN; THOMAS J. BADER, also known as T.J. Bader; PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANFORD H. SALTZ; MAX SLADOWSKY; and BERNARD ZIENTS,

Defendants

Civil Action No. 76-1208 FBL

ORIGINAL FILED
OCT 26, 1976
ANGELO W. LOCASCIO, CLERK

The matter having been opened to the Court by Sills, Beck, Cummis, Radin & Tischman, P.A., attorneys for defendants Community State Bank and Trust Co., Thomas J. Bader also known as T. J. Bader, Peggy Fitz, Leo Kaplowitz, Lloyd Harris, Arthur R. Croucher, John C. Giordano, Jr., Seymour Goldberg, Theodore Ley, Joseph Resnick, Fred Rothschild, Sanford H. Salz, Max Sladowsky and Bernard Zients upon a motion for dismissal of the complaint pursuant to Rule 12 FRCP and the

Appendix I

Court having considered the memoranda of law and supplemental memoranda of law filed by the moving defendants in support of the motion and by the plaintiff in opposition thereto and after due deliberation having been had and the Court having rendered its Letter Opinion dated October 12, 1976 and for good cause shown,

It is on this 26 day of October 1976.

ORDERED, that the complaint of the plaintiff as to the defendants Community State Bank and Trust Co. a New Jersey corporation, Karl Asch, former Union County Prosecutor, Michael J. Mitzner; Thomas J. Bader, also known as T. J. Bader, Peggy Fitz, Leo Kaplowitz, Lloyd Harris, Arthur R. Croucher, John C. Giordano, Jr., Seymour Goldberg, Theodore Ley, Joseph Resnick, Fred Rothschild, Sanford H. Salz, Max Sladowsky and Bernard Zients be and the same hereby is dismissed with prejudice, and it is further

ORDERED, that the action is also dismissed as to the defendants, Howard Frankel, J. Michael Breen and Glenn Owen with respect to all counts except that relating to the alleged assault and battery and with respect to such count of the complaint, the motion for dismissal is denied without prejudice to a renewal of the application as facts develop defining the exact roles of these defendants in the controversy, and it is further

ORDERED, that the Clerk of the Court shall enter a judgment against the plaintiff in accordance with the provisions of this Order.

s/ Frederick B. Lacey
Frederick B. Lacey
United States District Judge

APPENDIX J — ORDER OF HONORABLE FREDERICK B. LACEY ENTERING JUDGMENT OF DISMISSAL DATED SEPTEMBER 13, 1977

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

NATHAN PORTNER

Plaintiff

vs.

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL; MICHAEL J. MITZNER; J. MICHAEL BREEN; GLEN OWEN; THOMAS J. BADER, also known as T.J. Bader; PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANFORD H. SALZ; MAX SLADOWSKY; and BERNARD ZIENTS

Defendants

Civil Action No.
76-1208 FBL

Following selection of a jury and after argument of counsel on the offer of proof by the plaintiff, and the courts ruling thereon, plaintiff's attorney represented to the court that he could not sustain by a preponderance of the evidence the allegations that the defendants, Howard Frankel, J. Michael Breen and Glen Owen, committed an assault and battery upon Nathan Portner, plaintiff, and

Appendix J

It is, therefore, on this 13 day of 1977, ORDERED that that portion of the complaint be and is hereby dismissed with prejudice and without costs.

s/ Frederick B. Lacey
Hon. Frederick B. Lacey,
U.S.D.J.

FILED
Sep. 20, 1977
10:15 A.M.
Angelo W. Locascio

APPENDIX K — NOTICE OF APPEAL BY PLAINTIFF DATED SEPTEMBER 28, 1977

RICHARD SILVER
1139 East Jersey Street
Elizabeth, N.J. 07201
(201) 353-0443
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Plaintiff
NATHAN PORTNER

vs.

Defendant
COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey corporation, et als

Docket No. 76-1208 FBL

Notice is hereby given that NATHAN PORTNER, defendant above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of Judge FREDERICK B. LACEY, dated October 26, 1976, dismissing the Complaint of the plaintiff as to the defendants COMMUNITY STATE BANK AND TRUST CO., a New Jersey corporation; KARL ASCH, former Union County Prosecutor; MICHAEL J. MITZNER; THOMAS J. BADER, also known as T.J. BADER; PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANFORD H. SALZ; MAX SLADOWSKY and BERNARD ZIENTS with prejudice and further dismissing

the action as to the defendants HOWARD FRANKEL, J. MICHAEL BREEN, and GLEN OWEN with respect to all counts except that relating to the alleged assault and battery and, with respect to such count of the Complaint, denying the motion for dismissal without prejudice to a renewal of the application as facts develop defining the exact roles of these defendants in the controversy.

The balance of the matter involving the alleged assault and battery of HOWARD FRANKEL, J. MICHAEL BREEN, and GLEN OWENS was dismissed by Order of the Court on September 21, 1977.

s/ Richard Silver
RICHARD SILVER

DATED: September 28, 1977

APPENDIX L — JUDGMENT ORDER FROM THE THIRD CIRCUIT COURT OF APPEALS DATED JUNE 21, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-2406

NATHAN PORTNER,

Appellant

vs.

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL; MICHAEL J. MITZNER; J. MICHAEL BREEN; GLENN OWEN; THOMAS J. BADER; also known as T.J. Bader; PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEVY; JOSEPH RESNICK; FRED ROTHSCHILD; SANFORD H. SALZ; MAX SLADOWSKY and BERNARD ZIENTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 76-1208

Argued June 8, 1978

Before ROSENN, HUNTER and HIGGINBOTHAM, *Circuit Judges*

Appendix L

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

MAX ROSENN
Circuit Judge

ATTEST:

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

Dated: June 21, 1978

Supreme Court, U. S.
FILED
OCT 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-470

NATHAN PORTNER,

Petitioner,

vs.

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL, MICHAEL J. MITZNER; J. MICHAEL BREEN; GLENN OWEN; THOMAS J. BADER, also known as T. J. BADER, PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR. R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANFORD H. SALZ, MAX SALDOWSKY and BERNARD ZIENTS,

Respondents.

Brief and Appendix in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The respondents, Karl Asch, Michael J. Mitzner, J. Michael Breen and Glenn Owen, respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be denied.

OPINION BELOW

The letter opinion of the Honorable Frederick B. Lacey of the United States District Court for the District of New Jersey appears in the Appendix hereto along with the judgment entered. The judgment of the Third Circuit Court of Appeals also appears in the Appendix hereto. In affirming Judge Lacey's decision, Judges Rosenn, Hunter and Higginbotham of the Third Circuit Court of Appeals did not issue an opinion.

JURISDICTION

The petitioner, Nathan Portner, has invoked the jurisdiction of the court under 28 U.S.C. §1254(1).

COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Where a prosecutor and his staff act within the jurisdiction of the prosecutor's office, does such prosecutor and staff enjoy absolute immunity?

2. Once it has been determined that a prosecutor and his staff have acted within the jurisdiction of the prosecutor's office and are therefore absolutely immune from suit, is it the proper course of action for a United States District Court to dismiss the complaint pursuant to F.R.C.P. 12(b)?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Section 1254. Court of Appeals; Certiorari; Appeal, Certified Questions.

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any part to any civil or criminal case, before or after rendition of judgment or decree; . . ."

United States Code, Title 42:

Section 1983. Civil Action for Deprivation of Rights.

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

F.R.C.P. 12(b):

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matter outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

F.R.C.P. 52(a):

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The finds of a master, to the extent that the court adopts them, shall be considered as the finds of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

COUNTER-STATEMENT OF THE CASE

Respondent, Karl Asch, former Union County Prosecutor and respondents, Michael J. Mitzner, J. Michael Breen and Glenn Owen, employees in the office of the Union County Prosecutor, were notified in June of 1974 by authorities of the Community State Bank that a bribe had allegedly been offered by the petitioner, Nathan Portner (hereinafter referred to as "Portner"), to a bank employee in exchange for a confidential bank document. In response to this notification, the respondents pursued this charge and eventually arrested Portner and his son, Steven Portner. A formal criminal complaint was not filed against Steven Portner, but one was filed against Portner.

When the case came up before the Union County Grand Jury, said jury failed to return an indictment against Portner. As a result, the Union County Assignment Judge dismissed the criminal complaint. Portner then commenced the present suit for damages under 42 U.S.C. §1983. Portner alleged that the respondents violated his Fourth, Fifth, Sixth and Fourteenth Amendment rights under the Constitution. Portner alleged that the Community State Bank and several bank employees conspired with an employee of the prosecutor's office to entrap him and to unlawfully record a conversation between him and a bank employee for the purpose of showing that he had attempted to pay an illegal bribe to said bank employee. Portner charged the respondents, Breen and Owen, with illegal arrest, assault and battery and unlawful detention. Portner alleged that the respondent, Mitzner, had advised him that if he entered a plea of guilty, he would be charged with a disorderly persons offense, but if he refused, both he and his son would be charged with the commission of a "High Misdemeanor." Finally, Portner alleged that when he refused to enter a

plea of guilty, he was charged with such a "High Misdemeanor."

Pursuant to a motion brought under F.R.C.P. 12(b), the Honorable Frederick B. Lacey of the United States District Court for the District of New Jersey dismissed Portner's complaint for a failure to state a claim upon which relief can be granted. Judge Lacey held that the Union County Prosecutor and his staff were immune from suit under 42 U.S.C. §1983, and, therefore, the action against the Community State Bank and its employees could not be maintained. Portner appealed to the United States Court of Appeals for the Third Circuit. Judge Rosenn, Hunter and Higginbotham of that court affirmed Judge Lacey's decision without opinion.

REASONS FOR DENYING THE WRIT

Point I

Where the prosecutor and his staff act within the jurisdiction of the prosecutor's office, such prosecutor and staff enjoy absolute immunity.

Any discussion of the immunity status of a prosecutor and his staff must of course begin with the United States Supreme Court case of *Imbler v. Pachtman,* 424 U.S. 409 (1976). In that case, the Supreme Court considered the specific question of whether or not a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under 42 U.S.C. §1983 for alleged deprivations of the defendant's constitutional rights. In holding that a prosecutor is immune from such a suit, the Supreme Court stated that:

> "The common-law rule of immunity [of a prosecutor] is thus well settled. We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance *absolute immunity under §1983. We think they do.*
>
> If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment, both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. *Bradley v. Fisher,* 13 Wall, at 348; *Pierson v. Ray,* 386 U.S. at 554. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law" (emphasis added). 424 U.S. at 424, 425.

The Supreme Court went on to note that the ultimate fairness of the operation of the criminal justice system could be weakened if prosecutors were made subject to §1983 liability. The court concluded that:

> ". . . the considerations outlined above dictate the same *absolute immunity under §1983* that the prosecutor enjoys at common law" (emphasis added). 424 U.S. at 427.

The doctrine of Imbler, *supra* that a prosecutor enjoys absolute immunity from §1983 suits for damages when he acts within the scope of his prosecutorial duties has long been recognized in the Third Circuit, *United States ex rel. Moore v. Koelzer,* 457, F.2d 892 (3rd Cir. 1972); *United States ex rel. Rauch v. Deutsch,* 456 F.2d 130 (3rd Cir. 1972); *Bauers v. Heisel,* 361 F.2d 581 (3rd Cir. 1966) (*en banc*), *cert. denied* 386 U.S. 1021 (1967); as well as in the other circuits, *Palermo v. Warden, Green Haven State Prison,* 545 F.2d 850 (2nd Cir. 1976); *Hilliard v. Williams,* 540 F.2d 220 (6th Cir. 1976); *Tyler v. Witkowski,* 511 F.2d 449 (7th Cir. 1975); *Barnes v. Dorsey,* 480 F.2d 1057 (8th Cir. 1973); *Flood v. Harrington,* 532 F.2d 1248 (9th Cir. 1976); *Taylor v. Nichols,* 558 F.2d 561 (10th Cir. 1977); *Cf. Guerro v. Mulhearn,* 498 F.2d 1249 (1st Cir. 1974); *Weathers v. Ebert,* 505 F.2d 514 (4th Cir. 1974.

In *Cambist Films Inc. v. Duggan,* 475 F.2d 887 (3rd Cir. 1973), the plaintiff commenced a common law damages action against a prosecutor and his staff for the alleged illegal seizure of a certain film thought to be obscene, but which was subsequently adjudged not to be obscene. In holding the prosecutor to be immune from the plaintiff's suit, the court stated:

> "Ever considering the possible civil rights problem here, no liability can be attributed to the prosecutor in our present case because he was not acting where he clearly had no jurisdiction. He was investigating an alleged violation of the laws of Pennsylvania, which was within his powers and duties, and the actions which he proscribed in this instance were such as he felt necessary to the enforcement of those laws. Obviously, this case in no way approaches the "clear absence of jurisdiction" standard required for possible liability on the part of the prosecutor." 475 F.2d at 889.

In *Atkins v. Lanning,* 556 F.2d 485 (10th Cir. 1977), the plaintiff brought a §1983 action against a prosecutor and his staff to recover damages for an alleged wrongful arrest and imprisonment. In holding the prosecutor and his staff to be immune from the plaintiff's suit, the court stated:

> "The facts of this case clearly demonstrate that the function being performed by the district attorney was that of preparing and presenting a case, or in other words, those judicial functions for which absolute immunity is granted. *Apton v. Wilson,* 165 U.S. App. D.C. 22, 506 F.2d 83 (1974). Some leeway is needed to perform the function of assembling the state's case. *Weathers v. Ebert,* 505 F.2d 514 (4th Cir. 1974).
>
> While it is true that some investigative work is necessarily a prerequisite to the preparation of a prosecuting attorney's case, this does not automatically change the nature of his function to resemble that of a police officer . . . Case law indicates that the denial of immunity to a state prosecutor would doubtless require a gross abuse of the prosecutorial function, such as deliberately concealing evidence proving a defendant's innocence (emphasis added). 556 F.2. at 488.

Applying the criteria articulated above to the case at bar, it is clear that both Judge Lacey and the Third Circuit Court of Appeals were correct in holding that the respondents were clearly acting within the jurisdiction of the prosecutor's office so as to be immune from Portner's §1983 suit. In *Imbler, supra,* the court explicitly recognized that:

> "The function of a prosecutor that most often invites a common-law tort action is his decision to initiate a prosecution, as this may lead to a suit for malicious prosecution if the State's case misfires." 424 U.S. at 421.

Indeed, the activities of the respondents in the instant case were no different from those of the defendants in *Atkins, supra,* in "preparing and presenting a case, or in other words, those judicial functions for which absolute immunity is granted." 556 F.2d at 488. In short, the immunity extended to the respondents for the activities undertaken within the jursidiction of the prosecutor's office presents an "inseparable bar" to Portner's recovery. *Bramlet v. Wilson,* 495 F.2d 714, 716 (8th Cir. 1974).

In his petition for certiorari, Portner relies upon the cases of *Lofland v. Meyers,* 442 F. Supp. 955 (S.D.N.Y. 1977); *Robischaud v. Ronan,* 351 F.2d 533 (9th Cir. 1965); *Littleton v. Berbling,* 468 F.2d 389 (7th Cir. 1972), rev'd on other grounds, 414 U.S. 514 (1972); *Daniels v. Kieser,*

446 F. Supp. 1160 (N.D. Ill. 1978; *Clark v. Lutcher,* 436 F. Supp. 1266, motion for dismissal denied, 415 (M.D. Pa. 1977); *Austin v. Manlin* 433 F. Supp. 648 (E.D. Pa. 1977); *Slavin v. Curry,* 574 F.2d 1254 (5th Cir. 1978); *Walker v. Cahalan,* 542 F.2d 68 (6th Cir. 1976); and *Briggs v. Goodwin,* 569 F.2d 10 (D.C. Cir. 1977); cert. denied (1978) for the proposition that there is confusion among the Circuit Courts of Appeals with regard to the extension of prosecutorial immunity. A careful examination of those cases, however, reveals that Portner's reliance thereon is entirely misplaced. All of those cases in which prosecutorial immunity was not extended were cases in which the prosecutor and his staff acted in either an investigative, administrative or ministerial capacity, or acted clearly outside the jurisdiction of the prosecutor's office. These considerations are not involved in the case *sub judice* and, as such, the cases cited by Portner in his petition are inapposite to the case at bar.

In the instant case, Judge Lacey stated specifically that:

> "I find that, based on the above-mentioned criteria, the alleged acts of the defendant Frankel, as an employee of the prosecutor's office, were not clearly outside the authority of jurisdiction of the office. He was investigating a possible violation of the laws of New Jersey. See *Cambist Films, Inc. v. Duggan,* 475 F.2d 887, 889 (3rd Cir. 1973)."

Judge Lacey also stated that:

> "I find, in similar manner, that the activities of defendants Frankel, Mitzner, Breen and Owen in arresting, transporting, charging and issuing a complaint against plaintiff were each an integral part of the judicial process." See *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976); *Bauers, supra; Tunnell, supra.*

Judge Lacey concluded that:

> "I further find that no cause of action is stated against defendant Asch. No specific act by him is alleged in the complaint. He is being sued in his official capacity as Union County Prosecutor. I have earlier found, however, that the acts of his employees were within the scope of their offices and they were therefore, immune."

Judge Lacey's findings were affirmed without opinion by Judges Rosenn, Hunter and Higginbotham of the Third Circuit Court of Appeals, and said findings should not be disturbed unless they are "clearly erroneous." F.R.C.P. 52 (a); *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948); *Gibson and Odom Electric Co. v. R.F. Ball Construction Co.,* 368 F.2d 182 (3rd Cir. 1966).

Point II

Having determined that the respondents had acted within the jurisdiction of the prosecutor's office and were therefore absolutely immune from Portner's §1983 suit, Judge Lacey was correct in dismissing Portner's complaint for a failure to state a claim upon which relief can be granted.

In *Imbler v. Pachtman,* 424 U.S. 409 (1976), the Supreme Court dealt specifically with the procedure which a District Court should follow when such court is confronted with a case in which a prosecutor is entitled to the extension of immunity. The court stated that:

> "Moreover, *suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor.* The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not re-

> vealed to the defense, the propriety of a closing argument, and ultimately in every case the likelihood that prosecutorial misconduct so infected a trial as to deny due process are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a §1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials" (emphasis added). 424 U.S. at 425, 426.

Applying the criteria articulated above to the case at bar, it is clear that Judge Lacey was correct in dismissing Portner's complaint pursuant to F.R.C.P. 12(b) for a failure to state a claim upon which relief can be granted. Once Judge Lacey determined that the respondents had acted within the jurisdiction of the prosecutor's office and were, therefore, absolutely immune from Portner's §1983 suit, it was apparent "beyond a doubt" that Portner could "prove no set of facts in support of his claim which would entitle him to relief." *Conely v. Gibson*, 355 U.S. 41, 45 (1957).

In his petition for a writ of certiorari, Portner relies upon the case of *Helstoski v. Goldstein*, 552 F.2d 564 (3rd Cir. 1977) for the proposition that Judge Lacey erred in dismissing Portner's complaint. A careful examination of

that case, however, reveals that Portner's reliance thereon is entirely misplaced.

In *Helstoski, supra*, the District Court had granted the defendant's motion to dismiss the plaintiff's complaint for a failure to state a claim upon which relief can be granted. The court had relied upon *Imbler, supra*, in holding that the U.S. Attorney's Office enjoyed absolute immunity from the plaintiff's suit. The Third Circuit Court of Appeals reversed the District Court's decision, however, holding that the rationale of *Imbler, supra* did not apply since the allegations contained in the plaintiff's complaint referred to activities which were clearly outside the jurisdiction of the prosecutor's office.

In the instant case, Judge Lacey dealt with the question of whether or not the respondents had acted within the jurisdiction of the prosecutor's office. Judge Lacey determined specifically that the respondents had acted within the jurisdiction of the prosecutor's office so as to be immune from Portner's §1983 suit (*Point I, supra*) and this determination was affirmed by the Third Circuit Court of Appeals. From this, it necessarily follows that the facts of *Helstoski, supra* are entirely different from those in the case at bar, and, as such, *Helstoski, supra* is inapposite to the instant case.

CONCLUSION

In the present case, Portner raises only questions which have already been resolved twice in favor of the respondents and without any impact outside the limits of this case. From the foregoing law and facts, therefore, it is respectfully requested that Portner's petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

DWYER, CONNELL &
LISBONA
Attorneys for Respondents,
Asch, Mitzner, Breen and Owen

/s/ Daniel L. Martin
DANIEL L. MARTIN

APPENDIX A

LETTER OPINION OF HONORABLE FREDERICK B. LACEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
FREDERICK B. LACEY
JUDGE

UNITED STATES
COURT HOUSE
NEWARK, N.J. 07101

ORIGINAL TO THE CLERK

October 12, 1976

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Re: Portner v. Community State Bank & Trust Co.
Civil #76-1208

Counsel:

. I have received and reviewed all submissions on defendants' motion to dismiss and perceive no necessity for oral argument. Accordingly, pursuant to Fed. R. Civ. P. 78, I am determining this motion on the papers before me.

Plaintiff is suing Community State Bank and Trust Company (Bank), Karl Asch, former Union County Prosecutor,

and several individual defendants who were either former employees of the prosecutor's office or of the aforementioned bank for various acts allegedly committed by them which violated plaintiff's fourth, fifth, sixth and fourteenth amendment rights under the Constitution. The action is brought under 42 U.S.C. §1983. Plaintiff alleges that defendant Bank and several bank employees conspired with defendant Frankel, an employee of the prosecutor's office, to entrap plaintiff and to unlawfully record a conversation between him and defendant Fitz, a bank employee, for the purpose of showing that plaintiff attempted to pay an illegal bribe to defendant Fitz. Plaintiff charges defendants Frankel, Breen and Owens, employees of the prosecutor's office, with illegal arrest, assault and battery and unlawful detention. Defendants Mitzner and Frankel, he alleges, advised him that if he entered a guilty plea to a minor offense, he would be charged with a Disorderly Persons violation; if he refused, he and his son would be charged with the commission of a "High Misdemeanor." He alleges that when he refused to enter a guilty plea he was charged with violations of N.J. Stat. Ann. 2A:91-1, 2A:85-14 in retaliation, which complaint was dismissed on October 17, 1975.

The requirement that the alleged conspiracy be under color of state law, is of course, satisfied in that some of the defendants are members of the Union County Prosecutor's office.

The defendants base their motion on two grounds. They argue that the members of the prosecutor's office are immune from suit under section 1983. Because they are immune, the private defendants cannot then be held liable since they allegedly are not conspiring with persons acting under color of state law against whom a valid claim could

be stated. Defendants urge, secondly, that plaintiff fails to allege facts in his complaint with sufficient specificity as to constitute a proper pleading of a §1983 cause of action.

The common-law immunity of a prosecutor is not absolute. It is an immunity derivation from the immunity of judges and does not extend to acts clearly outside the authority or jurisdiction of the office of prosecutor. *United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3d Cir. 1972); *United States ex rel. Rauch v. Deutsch*, 456 F.2d 1301 (3d Cir. 1972); *Bethea v. Reid*, 445 F.2d 1163 (3d Cir. 1974), *cert. denied*, 404 U.S. 1061 (1972); *Gaito v. Ellenbogen*, 425 F.2d 845 (3d Cir. 1970); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1021 (1967).

In *Kaufman v. Moss*, 420 F.2d 1270 (3d Cir. 1970), plaintiff was convicted by a jury of conspiracy to commit burglary, burglary and larceny in state court. He then brought a suit for damages under the Civil Rights Act against the county district attorney and three other plaintiffs alleging that they had conspired to secure his convictions by the knowing use of perjured testimony. The court found that the district attorney was acting within his jurisdiction in bringing a criminal charge against plaintiff for a claimed violation of state law regardless of the allegation that the subsequent conviction was the result of perjured testimony. The district court's dismissal of the complaint for failure to state a claim, as to the prosecutor, was affirmed because of his immunity from suit. *Id.* at 1273. *See also Bethea v. Reid, supra*, at 1165.

In *Tunnell v. Wiley*, 369 F. Supp. 1260 (E.D. Pa. 1974), where the plaintiff charged that the state prosecutor as well as a newspaper reporter had violated his civil rights by the publishing of a newspaper article allegedly pre-

pared by both, the court found that even if it were shown that the prosecutor aided in the preparation of the article and the article deprived plaintiff of his right to a fair trial, the prosecutor was immune "since the acts alleged were not 'clearly outside the authority or jurisdiction of the office.'" *Id.* at 1270 (quoting *Bauers v. Heisel, supra,* at 590-91).

The first allegedly illegal act asserted by plaintiff is the conspiracy to entrap plaintiff by wiretapping the telephone conversation between him and defendant Fitz. I find that, based on the above-mentioned criteria, the alleged acts of the defendant Frankel, as an employee of the prosecutor's office, were not clearly outside the authority of jurisdiction of the office. He was investigating a possible violation of the laws of New Jersey. *See Cambist Films, Inc. v. Duggan,* 475 F.2d 887, 889 (3d Cir. 1973).

I find, in similar manner, that the activities of defendants Frankel, Mitzner, Breen and Owens in arresting, transporting, charging and issuing a complaint against plaintiff were each "an integral part of the judicial process." *See Imbler v. Pachtman,* 424 U.S. 409, 430 (1976); *Bauers, supra; Tunnell, supra.*

Accordingly, the motion for dismissal of the complaint as to defendant Mitzner is granted and as to defendants Frankel, Breen and Owens on the above mentioned counts. The only count remaining, which I find defendants Frankel, Breen and Owens potentially liable, is that of alleged assault and battery which are acts without the scope of their jurisdiction. The motion for dismissal is denied with respect to this count. This denial is, of course, without prejudice to a renewal of the application as facts develop defining defendants exact roles in the controversy.

I further find that no cause of action is stated against defendant Asch. No specific act by him is alleged in the complaint. He is being sued in his official capacity as Union County Prosecutor. I have earlier found, however, that the acts of his employees were within the scope of their offices and they were therefore immune. The remaining count against any of his employees, the allegation of assault and battery, is outside the scope of their authority and therefore defendant Asch cannot be held liable. The complaint is dismissed as to him.

The remaining defendants, former employees of Community State Bank and Trust Company and the Company itself, are private persons. Even if the alleged claims against them were true, they cannot be held liable in that they were not conspiring with persons acting under color of stage law against whom a valid claim could be stated. *Hill v. McClellan,* 490 F.2d 859, 860 (5th Cir. 1974); *Haldane v. Chagnon,* 345 F.2d 601, 604 (9th Cir. 1965); *Meyer v. Lavelle,* 389 F. Supp. 972, 976 (E.D. Pa. 1975). Indeed, plaintiff fails to allege any acts at all performed by defendants Harris, Croucher, Giordano, Goldberg, Lay, Resnick, Rothschild, Salz, Sladowsky and Zients.

I find, therefore, that plaintiff fails to state a claim against the private defendants as well. Defendants' motion to dismiss the claim as against these defendants is granted.

Submit an appropriate form of order.

Very truly yours,

/s/ Frederick B. Lacey
FREDERICK B. LACEY
United States District Judge

FBL:abw

APPENDIX B

ORDER OF DISMISSAL BY JUDGE LACEY DATED OCTOBER 26, 1976

ORIGINAL FILED
OCT. 26, 1976
ANGELO W. LOCASCIO, CLERK

The matter having been opened to the Court by Sills, Beck, Cummis, Radin & Tischman, P.A., attorneys for defendants Community State Bank and Trust Co., Thomas J. Bader also known as T. J. Bader, Peggy Fitz, Leo Kaplowitz, Lloyd Harris, Arthur R. Croucher, John C. Giordano, Jr., Seymour Goldberg, Theodore Ley, Joseph Resnick, Fred Rothschild, Sanford H. Salz, Max Sladowsky and Bernard Zients upon a motion for dismissal of the complaint pursuant to Rule 12 FRCP and the Court having considered the memoranda of law and supplemental memoranda of law filed by the moving defendants in support of the motion and by the plaintiff in opposition thereto and after due deliberation having been had and the Court having rendered its Letter Opinion dated October 12, 1976 and for good cause shown,

It is on this 26 day of October 1976.

ORDERED, that the complaint of the plaintiff as to the defendants Community State Bank and Trust Co. a New Jersey corporation, Karl Asch, former Union County Prosecutor, Michael J. Mitzner; Thomas J. Bader, also known as T. J. Bader, Peggy Fitz, Leo Kaplowitz, Lloyd Harris, Arthur R. Croucher, John C. Giordano, Jr., Seymour Goldberg, Theodore Ley, Joseph Resnick, Fred Rothschild,

Sanford H. Salz, Max Sladowsky and Bernard Zients be and the same hereby is dismissed with prejudice, and it is further

ORDERED, that the action is also dismissed as to the defendants, Howard Frankel, J. Michael Breen and Glenn Owen with respect to all counts except that relating to the alleged assault and battery and with respect to such count of the complaint, the motion for dismissal is denied without prejudice to a renewal of the application as facts develop defining the exact roles of these defendants in the controversy, and it is further

ORDERED, that the Clerk of the Court shall enter a judgment against the plaintiff in accordance with the provisions of this Order.

/s/ Frederick B. Lacey
FREDERICK B. LACEY
United States District Judge

APPENDIX C

ORDER OF HONORABLE FREDERICK B. LACEY ENTERING JUDGMENT OF DISMISSAL DATED SEPTEMBER 13, 1977

Following selection of a jury and after argument of counsel on the offer of proof by the plaintiff, and the courts ruling thereon, plaintiff's attorney represented to the court that he could not sustain by a preponderance of the evidence the allegations that the defendants, Howard Frankel, J. Michael Breen and Glen Owen, committed an assault and battery upon Nathan Portner, plaintiff, and

It is, therefore, on this 13 day of 1977, ORDERED that that portion of the complaint be and is hereby dismissed with prejudice and without costs.

/s/ Frederick B. Lacey
FREDERICK B. LACEY
United States District Judge

FILED
Sep. 20, 1977
10:15 A.M.
Angelo W. Locascio

APPENDIX D

JUDGMENT ORDER FROM THE THIRD CIRCUIT COURT OF APPEALS DATED JUNE 21, 1978

Argued June 8, 1978

Before ROSENN, HUNTER and HIGGINBOTHAM,
Circuit Judges

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

MAX ROSENN
Circuit Judge

ATTEST:

/s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

Dated: June 21, 1978

Supreme Court, U. S.
FILED
OCT 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-470

NATHAN PORTNER,

Petitioner,

vs.

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL; MICHAEL J. MITZNER; J. MICHAEL BREEN; GLEN OWEN; THOMAS J. BADER, also known as T. J. BADER; PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANDFORD H. SALZ; MAX SLADOWKY; and BERNARD ZIENTS,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 78-470

NATHAN PORTNER,

Petitioner,

vs.

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL; MICHAEL J. MITZNER; J. MICHAEL BREEN; GLEN OWEN; THOMAS J. BADER, also known as T. J. BADER; PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANDFORD H. SALZ; MAX SLADOWKY; and BERNARD ZIENTS,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Statutory Provisions Involved

United States Code, Title 42:

Section 1983. Civil Action for Deprivation of Rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

New Jersey Statute, Title 2A:

Section 85-1. Offenses Indictable at Common Law and Not Otherwise Covered, Punishable as Misdemeanors.

"Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not otherwise expressly provided for by statute, are misdemeanors."

Section 85-14. Aiders and Abettors: Principals.

"Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal.

Any person who wilfully causes another to commit a crime is punishable as a principal."

Section 91-1. Bank Officials, Etc., Asking or Receiving Bribes for Undue Fees.

"Any officer, director, employee, agent or attorney of a bank, trust company, savings bank, building and loan association, savings and loan association or credit union who, directly or indirectly, asks for, demands, exacts, requires, receives or accepts, for his personal use, benefit or advantage, any money, or any promissory note, bill of exchange, check or other evidence of debt, or any security, promise, contract, covenant, agreement or obligation, express or implied, for the payment, delivery, alienation or transfer of any money, property or other thing, or for the performance or rendering of any act or service, as a bribe, present, reward, inducement, commission or fee for loaning any funds of or giving any credit on behalf of such bank, trust company, savings bank, building and loan association, savings and loan association or credit union, or for recommending, approving, voting for or consenting to the making of any loan or the giving of any credit by such bank, trust company, savings bank, building and loan association, savings and loan association or credit union, is guilty of misdemeanor."

Section 156A-4b. Exceptions.

It shall not be unlawful under this act for:

". . . b. A person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception;"

Section 170-88. Corruption of Agents, Employees or Servants; Corporate Agents Punishable Individually.

"Any person who gives, offers or promises any gift or gratuity to any employee without the knowledge and consent of his employer, and with intent to influence his action with relation to his employer's business, and any employee who, without the knowledge and consent of his employer, requests or accepts any gift or gratuity, or any promise to make a gift or to do any act beneficial to himself, under an agreement or understanding that he shall act in any particular manner to his employer's business, is a disorderly person. Any employee who, being authorized to procure materials, supplies or other articles, either by purchase or contract, or to employ service or labor for his employer, receives directly or indirectly for himself or for another, a commission, discount or bonus from the person who makes such sale or contract or furnishes such materials, supplies or other articles, or from a person who renders such service or labor, and any person who gives or offers such employee such commission, discount or bonus, are each of them a disorderly person.

If a corporation, partnership or other organization is guilty of a violation of this section, the persons through whom it acts are each of them a disorderly person.

In this section the term 'employee' includes any agent, employee or servant, and the term 'employer' includes any principal, employer or master."

F.R.C.P. 12(b):

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Counter-Statement of the Case

In or about May, 1974, petitioner Nathan Portner offered to respondent Peggy Fitz, an employee of respondent Community State Bank, a bribe in exchange for a confidential loan document. The Bank, thereupon, notified respondent Howard Frankel, Captain of the County Detectives in the office of the Union County Prosecutor, respondent Karl Asch, of the proposed bribe. In response, Frankel and other detectives in the Prosecutor's office sought further evidence to support the complaint by the Bank and arrested Nathan Portner and his son, Steven Portner, when the latter arrived at the Bank to receive the confidential bank document and thereafter gave it to Nathan Portner. No formal criminal Complaint was filed against Steven Portner.. A Complaint was filed against the petitioner Nathan Portner charging him with the violation of N.J.S. 2A:91-1 and N.J.S. 2A:85-14 in that petitioner offered and promised to pay to Peggy Fitz, an employee of the Bank, the sum of $500 for a copy of a confidential loan document.[1]

When the Union County Grand Jury failed to return a "true bill" against Nathan Portner and the Union County

[1] Contrary to what petitioner states in his Statement of the Case, petitioner Nathan Portner could have legitimately been charged under N.J.S. 2A:85-14 as one who aids, abets, or induces another to commit a crime in this case—N.J.S. 2A:91-1—the proffer of a proposed bribe to be received by a bank employee for the specific performance of her action in releasing a confidential loan document. Additionally, the statutes of New Jersey contain a general provision, N.J.S. 2A:85-1, were no specific statute to be applicable, making all cheats and deceits and other offenses which were indictable at common law misdemeanors under New Jersey law. Finally, the alleged activity of petitioner Nathan Portner involving the attempted corruption of employees has been clearly branded as illegal by N.J.S. 2A:170-88.

Assignment Judge dismissed the Complaint, the instant suit for damages under 42 U.S.C. § 1983 was instituted by the petitioner Nathan Portner.

Although the scenario which petitioner sets forth in his Statement of the Case may be interesting, it does not reflect the state of the pleadings or the record at the time dismissal of the Complaint pursuant to F.R.C.P. 12(b)(6) was granted to the respondents.

Petitioner, using the vehicle of the Statement of the Case in his Petition for a Writ of Certiorari, now seeks to supplement, pad or otherwise augment the record with certain alleged facts and several appendices (App. A through E of Petition, pp. 1a-8a) which were neither in the pleadings nor in the record before the District Court nor before the Third Circuit Court of Appeals. Such a clear violation of the rules of appellate procedure by the petitioner should not be countenanced by this Court.

At the time of the dismissal of the within Complaint, the only "facts" before the Court were those alleged in petitioner's Complaint (App. F of Petition, p. 9a). Petitioner alleged therein that respondent Bank and several bank employees conspired with respondent Frankel to entrap petitioner and to unlawfully record a conversation between him and respondent Fitz[2] for the purpose of showing that petitioner attempted to pay an illegal gratuity to respondent Fitz. Petitioner charges respondents Frankel, Breen and Owen, employees of the prosecutor's office, with illegal arrest, assault and battery and

[2] The Complaint on its face, clearly establishes that the recording of the conversation between petitioner and the respondent Fitz was made with the permission and consent of the respondent Fitz, one of the parties to the conversation and thus was not unlawful under New Jersey law. N.J.S. 2A:156A-4(b).

unlawful detention. He further alleges that respondents Mitzner and Frankel attempted to intimidate him into entering a guilty plea to a disorderly persons violation; otherwise they would charge him with the commission of a high "misdemeanor." He alleges that when he refused to enter a guilty plea he was charged with violations of N.J.S. 2A:91-1, 2A:85-14 which Complaint was dismissed after the Grand Jury failed to return a "true bill" against him. In sum, petitioner alleges that all the respondents conspired to violate his civil rights as protected by 42 U.S.C. § 1983.

On motion by respondents Bank, its officers and employees, the Honorable Frederick B. Lacey dismissed all of petitioner's causes of action except for the assault and battery count against Frankel, Breen and Owen.[3] He found that the witihn Complaint failed to state a cause of action as required by Fed. R. Civ. P. 12(b) because the allegations asserted in the Complaint constituted a quasi-judicial function of the prosecutor's office and therefor the respondents who were employed by said office were absolutely immune from liability under 42 U.S.C. § 1983. He further found that since the prosecutor and his employees were clothed with immunity, the Complaint against the respondent Bank and its officers and employees, as "private persons" could not be maintained because "they were not conspiring with persons acting under color of state law against whom a valid claim could be stated."

An appeal was taken by petitioner to the Third Circuit Court of Appeals and after hearing extensive argument, the Court affirmed the decision of Judge Lacey by the entry of a judgment order (App. L of Petition, p. 30a).

[3] This was petitioner's most heinous charge and said charge was dismissed at the trial of the action when petitioner admitted before the Court that he could not sustain the charge by a preponderance of the evidence. (App. J of Petition, p. 26a).

REASONS FOR DENYING CERTIORARI

POINT I

Writ of certiorari should be denied because the decision below is correct. There is no conflict between the circuits and the petitioner's claims raise purely hypothetical questions within the context of this case.

Petitioner's application is divided into four separate points which appear to present several reasons for granting certiorari. The first three points raised by petitioner are a contention that this Court should clarify its decision in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), with respect to the immunity status of a prosecuting attorney and his staff. Respondents submit first, that clarification is not needed, and secondly, that if it may be needed, it will not be furthered by this case. Consequently, petitioner's present application is without merit. Respondents will answer in two points.

Petitioner, mouthing the wording of Rule 19, suggests that the opinion of the Court of Appeals for the Third Circuit in this case has created a conflict among the circuit courts. The cited cases, however, do not support the assertion. Any conceivable conflict must be one over the import and scope of the prosecutorial immunity settled by *Imbler, supra*. Cases which precede that precedent necessarily cannot be involved in that process. *Camlist Films* v. *Duggan*, 475 F.2d 887 (3d Cir. 1973); *McCray* v. *Maryland*, 456 F.2d 1 (4th Cir. 1972); *Littleton* v. *Berbling*, 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds*, 414 U.S. 514 (1972); *Robichaud* v. *Ronan*, 351 F.2d 533 (9th Cir. 1965). Citation to those cases, hence, is immaterial. Similarly, actions of district courts do not rise to the level of an opinion by a coordinate court. *Daniels* v. *Kieser* 446 F. Supp. 1160

(N.D. Ill. 1978); *Lofland* v. *Meyers,* 442 F. Supp. 955 (S.D.N.Y. 1977); *Clark* v. *Lutcher,* 436 F. Supp. 1266, *motion for dismissal denied,* 415 (M.D. Pa. 1977); *Austin* v. *Manlin,* 433 F. Supp. 648 (E.D. Pa. 1977). Conflict, if any, between the aforesaid cases and the Third Circuit Court of Appeals decision in this case alone do not justify the granting of certiorari, for it is the duty of the courts of appeals to maintain uniformity within their respective circuits and to supervise the decisions of the various district courts.

The decision of the Third Circuit Court of Appeals in this case is clearly correct and completely in line with *Imbler, supra,* and the decisions of the coordinate courts in the other circuits following the precedent in *Imbler.*

The Third Circuit Court of Appeals affirmed the decisions of Judge Lacey determining that all the actions of the Office of the Prosecutor in wiretapping the conversation, arresting, transporting, charging and filing the Complaint against petitioner were each an "'integral part of the judicial process.'" (App. H of Petition, p. 22a). Clearly the aim of all these actions was to further the quasi-judicial function of the prosecutor.

Under the circumstances of this case, all these actions are far from being purely investigatory simply because they were performed prior to the execution of any written complaint against the plaintiff. There is no dispute that the Union County Prosecutor's office received a complaint from a citizen, the respondent Bank, that petitioner had offered the payment of a bribe to respondent Peggy Fitz, an employee of said Bank, to provide petitioner with certain confidential documents in violation of New Jersey law. As far as the Prosecutor's office was concerned, a crime may well have been already committed by petitioner. At

that point, if the testimony of the Bank was credible, there was sufficient evidence of a crime to arrest petitioner. Therefore, any subsequent actions taken by the respondents, as employees of the Prosecutor's office, were integrally related to the prosecutor's decision to gather corroborative evidence of the crime for the reasonably contemplated future criminal prosecution of petitioner. Clearly, petitioner's attempt to characterize these actions as merely a general fishing expedition for possible criminal violations with no concrete purpose or specific focus of using the results in future proceedings against a specific person is without foundation.

This Court in *Imbler, supra,* recognized the need to extend the scope of quasi-judicial immunity to certain prosecutorial investigation similar to the instant matter when it stated:

> We recognize that the duties of the *Prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom.* A prosecuting attorney is required, constantly, *in the course of his duty as such,* to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. *Preparation, both for the initiation of the criminal process and for trial, may require the obtaining, reviewing, and evaluating of evidence.* 420 U.S. at 431 n. 33. (Emphasis added).

Thus, this Court in *Imbler, supra,* suggested that such acts as in the instant case which are clearly associated with and preliminary to the obtaining of evidence in

preparation for the initiation of the criminal process against the petitioner are quasi-judicial functions of the office of the prosecutor and thus absolutely immunized.

The various courts of appeals have uniformly applied and followed this precedent. In *Atkins* v. *Lanning,* 556 F.2d 485, 488 (10th Cir. 1977), the Court held that the district attorney and his investigators were absolutely immune because their part in the alleged wrongful arrest and imprisonment of plaintiff was

> ". . . that of preparing and presenting a case, or in other words, those judicial functions for which absolute immunity is granted. *Apton* v. *Wilson,* 165 U.S. App. D.C. 22, 506 F.2d 83 (1974). Some leeway is needed to perform the function of assembling the state's case. *Weathers* v. *Ebert,* 505 F.2d 514 (4th Cir. 1974)."

Similarly, *Bruce* v. *Wade,* 537 F.2d 850 (5th Cir. 1976), held that seeking an indictment was initiation of a prosecution and thus within the shelter of *Imbler.*

Finally, in the most recent decision in the case of *Briggs* v. *Goodwin,* 569 F.2d 10 (D.C. Cir. 1977), *cert. denied* (1978), the Court, while finding lack of any prosecutorial function under the general fishing expedition circumstances of its case, at the same time recognized and reaffirmed the applicability of *Imbler* to a situation such as here when, after quoting this Court in *Imbler* at 431 n. 33, it stated:

> Although he passage quoted above makes it clear that a prosecutor's advocacy function does extend beyond the confines of the trial courtroom, the examples of such preliminary advocate activities provided by the *Supreme Court are instructive for their common focus on a particular criminal proceeding. By the plain import of the Court's remarks absolute immunity under Imbler extends only so far as necessary to protect a prosecutor's decision with respect to the initiation and conduct of particular cases. Imbler does not, in our reading, immunize prosecutors for any and all measures they may undertake in the course of wide-ranging law enforcement investigations or general fact-finding expeditions.* Id., at 19-20. (Emphasis added)

The Third Circuit Court of Appeals affirmance of Judge Lacey's decision is in complete conformity with this Court's instructions in *Imbler, supra,* and other circuits' recognition of same, whether explicit or implicit, concerning the common focus on a particular criminal proceeding as a delineating line between prosecutorial and purely investigative functions. It is precisely this lack of a specific focus on a particular criminal proceeding that motivated the Court in *Walker* v. *Cahalan,* 542 F.2d 681 (6th Cir. 1976) to hold that a prosecuting attorney was not immune for sending a damaging letter about plaintiff after an order of *nolle prosequi* had been entered on a murder charge against plaintiff and while no charges were currently pending. The Third Circuit implicitly reasoned similarly in *Helstoski* v. *Goldstein,* 552 F.2d 564 (3rd Cir. 1977).

In view of the foregoing, it is apparent that the Third Circuit Court of Appeals has decided this case in complete conformity with *Imbler, supra,* and with all court of appeals cases subsequent to *Imbler.*

Even though petitioner tries to create the illusion that there is a conflict among the circuits, the lack of merit to this contention is evident. A similar lack of merit taints petitioner's contention that this Court's decision in *Imbler*

needs clarification or that this Court needs to set the guidelines for determining the delineation of a prosecutor's prosecutorial, investigative, and administrative function.

It is also evident that, even if clarification were needed, this clarification would not be provided by this case because all of the alleged activities in question, under the circumstances of this case, are clearly an integral part of the quasi-judicial function of the prosecutor's office. For the same reasons, even if a writ of certiorari were to be granted, this Court would never reach the question which the petitioner presents in Point III, namely, whether the prosecuting attorney and his staff should be granted absolute immunity for actions taken by them while performing the administrative and investigative functions of their office. Thus, this question is purely hypothetical in the context of this case. E.g. *Muskrat* v. *United States*, 219 U.S. 346 (1911). No reason for the grant of certiorari is present therefor.

POINT II

A trial court's dismissal of a Complaint pursuant to Rule 12(b)(6) has long been approved by this Court and raises no exceptional issue for disposition.

In his fourth point petitioner contends that a trial judge may not dismiss a Complaint else the petitioner's right to due process will be denied. Petitioner's contention, in its essentials is an argument that a Complaint can only be dismissed after full discovery.

In *Helstoski, supra,* the Court indicated that that particular complaint should not have been dismissed without some discovery. Yet, neither that case nor any other case discovered by research has ever promulgated the general

rule that suits of this nature must proceed through discovery. Indeed, this Court itself in *Imbler* v. *Pachtman,* at 419, 425, recognized the need for the availability of an absolute immunity to defeat suits of this nature at the very outset.

On the face of the Complaint, as presented before the District Court, the alleged acts of the prosecutorial respondents in wiretapping, arresting and transporting and filing of the Complaint against plaintiff were obviously not clearly outside of the authority of jurisdiction of the prosecutor's office. The District Court in dismissing the allegations of this particular Complaint implicitly determined that under any circumstances, the petitioner herein was not entitled to any relief. No reason for the grant of certiorari is present therefor.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the instant petition for writ of certiorari be denied.

Respectfully submitted,

SILLS, BECK, CUMMIS, RADIN & TISCHMAN, P.A.,
Attorneys for Respondents Community State Bank and Trust Company, Thomas J. Bader, Peggy Fitz, Leo Kaplowitz, Lloyd Harris, Arthur R. Croucher, John C. Giordano, Jr., Seymour Goldberg, Theodore Ley, Joseph Resnick, Fred Rothschild, Sanford H. Salz, Max Sladowky, and Bernard Zients
By: MORTON S. BUNIS

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